RESPONSE OF EQB STAFF
TO COMMENTS FILED
ON CHAPTER 4400 AMENDMENTS
October 22, 2002

The Environmental Quality Board staff has reviewed the comments on the proposed amendments to Minnesota Rules chapter 4400 filed by the following persons: Sierra Club (Paula Maccabee), Department of Natural Resources (Rebecca Wooden), Minnesota Center for Environmental Advocacy (David Zoll and Noah Hall), Laura and John Reinhardt, the Department of Commerce (Susan Medhaug), the Minnesota Transmission Owners (Todd Guerrero), and the Association of Minnesota Counties (David Weirens). Some of the changes suggested are good ones that will improve the rules, and the staff supports changing the language in a number of respects. Other changes do not seem appropriate to the staff and are not supported. The staff indicates below the changes it would support.

Part 0200. DEFINITIONS.

Subp. 6. Developed portion of the plant site. The EQB proposed repealing this definition because it was not used in the rules. However, as the staff explained on the first day of the hearing, the term is used in the rules in the important provisions in part 0650 relating to exceptions, so a definition should be included. The staff introduced Exhibit 16 into the record, which was a proposed definition for the phrase.

The Sierra Club agrees that a definition should be included in the rules, but the Club has suggested different language than that proposed by the staff. The Sierra Club would exclude fuel storage from the developed portion of the site. Excluding fuel storage from the definition seems inappropriate because the fuel storage facilities are associated facilities that will be considered by the EQB in the initial permitting decision. It would be strange to require that the fuel storage facilities be permitted under the site permit in the first place but not be included as part of the developed portion of the site. The other references in the Sierra Club language to buffers and setbacks and other portions developed for something other than electricity generation seem inappropriate because while they may be factors to consider in determining the boundaries of the developed portion of a particular site, it is not certain whether such features fall within or without the developed site.

The EQB staff recommends that the ALJ recommend the language in Exhibit 16.

Subp. 10. Large Electric Power Generating Plant. The Department of Commerce suggests that language be added to this definition to give examples of certain facilities that qualify as "associated facilities." This would make the definition consistent with the definition in subp. 8 for "high voltage transmission line," where a description of associated facilities is included. The staff agrees that this is appropriate. However, we prefer the following language to that suggested by the Department. <u>"Associated facilities shall include, but not be limited to, coal piles, cooling towers, ash containment, fuel</u>

tanks, water and wastewater treatment systems, and roads." This language is consistent with the explanation the staff gave for adding a definition of "Developed portion of the plant site" in subpart 6, *see* Exhibit 16, and with the explanation in the Statement of Need and Reasonableness (SONAR) at pages 10-11.

The EQB staff recommends that this definition be amended in accordance with the language suggested above.

Subp. 11a. Mail. The staff agrees with the Department of Commerce that the word "shall" should be struck.

Part 400.0400. PERMIT REQUIREMENT.

MCEA suggested that the phrase "generating capacity" be added to the language in both subparts 3(C) and 3(D) to ensure that a permit is obtained before the capacity is expanded, regardless of whether the output was increased. The EQB would have required a permit prior to construction even under the existing language, but it helps clarify the intent to add the phrase so the staff would support such a change in the language. It also makes sense to make the reference to the EQB consistent in both provisions. The staff recommends the following language:

C. Except as provided in part 4400.0650 or 4400.3820, no person shall increase the generating capacity or output of an existing large electric power generating plant without a site permit from the EQB. ~~board.~~

D. No person shall increase the generating capacity or output of an electric power plant from under 50 megawatts to more than 50 megawatts without a site permit from the EQB.

Part 4400.0500. SMALL PROJECTS.

Subp. 1. No EQB permit required. The Sierra Club has raised the concern that a project proposer could develop a series of power plants under 50 megawatts on adjacent sites or even on the same site because of the language in this provision recognizing that a permit for a plant under 50 MW is not required. This is not only an unrealistic scenario, but the proposed language in part 4400.0400, subp. 3 is broad enough to capture such a situation and require a permit. If a situation should occur where a second power plant were proposed adjacent to an existing plant, the EQB could determine at that time whether the action was a deliberate attempt to avoid the Power Plant Siting requirements. The provisions of part 4400.0400, subp. 3, items C. and D. would apply to require a permit if the second project were really an expansion of the existing plant. The staff does not believe that it is necessary to add any language to the rules.

Subp. 5. Commence construction. MCEA wants a phrase added to restrict any conduct that might impair the natural environment on or around the site or route. EQB staff agrees that conduct adversely impacting the environment should not commence

prior to obtaining a permit if the conduct is related to construction of the proposed facilities, and the language in the rule is intended to do just that. If the conduct is not related to the project, or goes outside the proposed boundaries of the project, these rules are not the place to attempt to regulate that conduct.

Part 4400.0650 EXCEPTIONS TO PERMITTING REQUIREMENT FOR CERTAIN EXISTING FACILITIES.

This is the provision of the rules that allows the operator of an existing facility to make certain changes without obtaining a site permit from the EQB. This rule is based on the idea that certain modifications of existing facilities do not constitute construction of a LEPGP or HVTL under the Power Plant Siting Act. Minn. Stat. § 116C.57, subds. 1 and 2. The Sierra Club, the Minnesota Center for Environmental Advocacy (MCEA), the Transmission Owners, and the Department of Commerce have all commented on this part of the rules and suggested changes. We have the following response to the comments.

Subp. 1, item C(1). Maintenance or repair. MCEA wants language added to clarify that this provision only applies to maintenance or repair that does not increase the generating capacity of the plant. It is not necessary to include this phrase because other provisions of the rules, specifically part 4400.0400, subp. 3(C) and (D) and other parts of 0650, subp. 1(C), apply to conduct that will result in an increase in the generating capacity. Adding the phrase to this part could make it sound like an increase in capacity could qualify as maintenance or repair, and we prefer that increases in capacity be covered under the other provisions.

MCEA objects to the discussion in the Statement of Need and Reasonableness (SONAR) about the rationale behind this provision and requests that certain portions of the SONAR be struck. The SONAR, however, has been finalized, and it is not appropriate to change the words in a document that has been made part of the record. MCEA's comments will also be a part of the administrative record, and the Center's comments about this provision will be available for future consideration if questions arise about the interpretation of this rule. Also, MCEA's concern that the language represents a concession to the utilities and will result in future disagreements being resolved in favor of the utility is unwarranted. The fact that language in a rule reflects the preference of one interested party does not mean that all disagreements will be resolved in favor of that party. The fact that the EQB staff supports adding references to the Minnesota Environmental Policy Act in other provisions of the rules does not mean that MCEA and the Sierra Club get to determine what that language means in all instances of future application. What is important is what the agency intends when it adopts certain language. The SONAR helps explain what was intended by the adoption of certain language.

Subp. 1, item C(2). Efficiency increases. The Sierra Club and MCEA object to this exception from the permitting requirement. Both groups assert that allowing an increase in capacity of up to 100 MW could result in increases in air pollutants being emitted, and MCEA has calculated how many more tons of coal could be burned if a

plant improved its efficiency but expanded its capacity. Presumably both Sierra Club and MCEA would not object to an exception from the permitting requirement if a utility was simply improving the efficiency of the plant without increasing the capacity, because this would reduce emissions.

It is only capacity expansions involving an efficiency improvement that are exempted here, and then only up to 100 MW and only if the efficiency improvements can be implemented without expanding the plant site. If the plant site is going to be expanded, or if the capacity expansion is not associated with efficiency improvements, this provision does not apply. It seems consistent with a legislative policy to promote efficiency improvements, expressed through the statute exempting efficiency improvements from the certificate of need requirements, Minn. Stat. § 216B.243, subd. 8(6), to recognize that a siting decision is not required. It doesn't eliminate the necessity for government to review the expansion beforehand, because the Pollution Control Agency will still require permits for an increase in air pollutants or water pollutants or other environmental impacts. EQB staff recognizes that pollution impacts could increase from the expansion, but given these other improvements, it seems reasonable to recognize that a siting decision is not necessary in such situations and allow the PCA to regulate the increase in pollution.

The Department of Commerce has also commented on this part of the rules. The Department recognizes that since such efficiency improvements and capacity expansions are exempt from certificate of need requirements under the Public Utilities Commission statutes, it is appropriate to exempt them from site and route permitting.

In items (C)(2) to (C)(5), the staff recommends a slight editing change to use the phrase "developed portion of the plant site" since this is the phrase that is defined in part 4400.0200, subp. 6.

Subp. 1(C)(3). Refurbishment. This provision applies only to a very narrow band of conduct. Item (C)(3) only exempts refurbishment of an existing plant if the capacity is not expanded, the site is not expanded, and a certificate of need is not required from the Public Utilities Commission. The Sierra Club is afraid this language could allow a utility to spend millions of dollars to extend the life of an old plant or to rebuild a plant destroyed by fire. However, if a certificate of need is required, then the exemption does not apply. Also, under Minn. Stat. § 216B.2422, subd. 4, the PUC cannot approve a refurbishment or allow rate recovery for the refurbishment unless the utility has demonstrated that a renewable energy facility is not in the public interest. Between the PUC and the EQB, no existing plant will be refurbished without review.

Subp. 1(C)(4). Conversion to Natural Gas. MCEA wants to strike a part of the SONAR discussing how this provision might apply to conversion of certain existing Xcel Energy power plants. SONAR, pages 23-24. That discussion was included for illustrative purposes only. In fact, the SONAR states, "It is not possible at this time to determine in any final sense what level of review is appropriate, but the following discussion should be helpful in analyzing the manner in which a decision would be

made." SONAR at page 23. There is certainly nothing wrong with explaining in a SONAR how the agency proposing the rule envisions it might apply in the future. Of course, a final decision on any matter will wait until the proper time when all the facts are available and can be applied to the law.

Subp. 1(C)(5). Startup of Closed Plant. MCEA and the Sierra Club also object to this category of exception. Both groups advocate that a permit be required if an existing plant is closed for more than one year. The EQB has proposed to include this exception because there does not seem to be a real siting decision to be made when the plant already exists and because historically the EQB has not made a siting decision when a closed, old plant has reopened. The power plant in Taconite Harbor was reopened in about 1990 after being closed down for several years, and no site permit was required from the EQB at that time.

Subp. 3. Notice. This is the provision that requires owners of LEPGPs and HVTLs to advise the EQB before they make certain modifications to existing facilities that are exempt from permit review under this rule. MCEA requests that language be added to the rule to require the EQB to publish a summary of all such modifications at least once per month. It is a good idea to provide notice to the public that an existing facility is proposed to be modified, but the EQB staff does not recommend that language be added to require the agency to update a list at least once per month. It is sufficient for the EQB to include information on its webpage about proposed modifications and to keep its webpage current.

The Transmission Owners have commented on this provision as well. The Transmission Owners want language added to address what the consequences are of failing to notify the EQB in advance of implementing an exempt modification to an existing facility. The reason for the notice is so that the EQB can confirm that a proposed modification indeed qualifies under the exemption language. Even if the notice is late, if the EQB disagrees that the modification is exempt, the EQB will likely request the person to stop work on the modification until the permit process can be completed. If the modification does qualify, the person is entitled to continue with work. Therefore, we do not believe that the requested language should be included in the rule.

Subp. 4. Local Review. This provision provides that if a modification to an existing facility is exempt from state permitting by the EQB, it is exempt from local review too. The Sierra Club objects to this provision and requests that the authority of local government to regulate such modifications of existing facilities be preserved. The Department of Commerce also commented on this provision, stating that local units of government should be allowed to assert jurisdiction but recognizing that this issue merits further legal review. The Association of Minnesota Counties did not comment on this specific provision, but in general the Association commented that the authority of local units of government to make their own decisions should be recognized.

Therefore, the EQB staff would recommend that this provision of the rules be deleted. If a person should propose to modify an existing facility in a way that is exempt

from the requirement to obtain a site or route permit from the EQB, the local unit of government can determine, with input from the project proposer and concerned citizens, whether a local permit is required. By deleting this provision from the rules, the question of whether a local permit is required can be decided by local officials at the time a modification is proposed. Since local units of government only have jurisdiction over certain, smaller projects, modifications to the larger facilities that do not fall under local jurisdiction would be exempt from local review.

Part 4400.1150. CONTENTS OF APPLICATION.

The Transmission Owners have requested a clarification of what is required to be included in a permit application with respect to property owners affected by a proposed HVTL route under subpart 2.G. The Transmission Owners wonder whether the names required are of the same people who will be sent notice under part 4400.1350, subp. 5. The answer is yes and the staff recommends the following clarifying language:

G. the names of ~~the~~ each owner~~s of the~~ whose property is within any of the proposed routes for ~~of the land to be crossed by~~ the high voltage transmission line ~~within the two routes proposed~~.

The Department of Natural Resources requested that certain information about possible water impacts be specifically included in the list of information that must be part of a permit application for a large power plant. (The DNR made this comment under the heading of part 4400.1500 but the correct citation is part 1150.) The list proposed in the rules tends to be more generic than the specific information requested by DNR. The language in subpart 3, item E. ("a description of the effects of the facility on the natural environment, including effects on air and water quality resources and flora and fauna") is intended to cover the kind of information the DNR wants in order to evaluate the potential impacts of a proposed project. Rather than attempt to list in the rule the specific pieces of information that the EQB or the DNR (or other agencies for that matter) will require to evaluate a proposed project, the EQB staff prefers to keep the language as proposed, which has existed in the rule for nearly thirty years. The rule does not describe any specific air quality impacts, such as sulfur dioxide emissions, but that kind of information will surely be required as part of a permit application for a new power plant. The fact that DNR has indicated that specific information on water requirements and monitoring and conservation measures will be necessary for the DNR to review the project is enough to ensure that the EQB will require applicants to include this kind of data without specifically listing it in the rule.

MCEA has objected to the idea that a proposer of a LEPGP can elect to propose two sites that are contiguous to each other. This happened in the past with the Lakefield Junction gas-fired peaking plant in Martin County. *See* SONAR at page 29. The EQB staff would prefer that the two sites that are proposed be significantly different so a comparison can be made, but the law does not prohibit a proposer from proposing two sites that are close together and similar. It is difficult for a project proposer who does not have condemnation power to obtain two sites that are far apart. The way this concern can

be addressed is through the scoping process, where alternative sites can be identified for evaluation.

MCEA also emphasized in its comments that the EQB must implement the nonproliferation principle described by the Supreme Court in the *PEER* case. *People for Environmental Enlightenment and Responsibility, Inc. (PEER) v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1978). MCEA wants language added to the SONAR indicating that the EQB will give preference to existing power line rights-of-way. As discussed earlier, it is not appropriate to change a document that has been finalized and entered into the record, so the SONAR cannot be changed at this time, but the EQB staff can say here that the EQB Board will follow the requirements of state law, both statutory and caselaw, to the best of its ability in all matters.

Part. 4400.1250. REVIEW OF APPLICATION.

The Sierra Club has commented that the public has to be advised when a person proposing a project submits a draft application to the EQB. The Sierra Club wants language added to the notice provisions of part 4400.1350 to require notice of draft applications. The EQB is considering ways to most effectively use its webpage to convey such information to the public, but the staff does not support adding language to any of the rules to require either an applicant or the agency to provide formal notice of draft applications. Draft applications are often submitted piecemeal and sometimes several drafts are submitted before the final application is completed. It is important for the public to be aware that proposed power plants and transmission lines are being considered, and the EQB, along with PUC with its development of rules for the transmission planning process under Minn. Stat. § 216B.2425, is considering ways to ensure that information about proposed projects is conveyed to the public.

The Sierra Club also wants the language in subpart 3 changed to clarify that the applicant has the burden to show that an incomplete application can be supplemented within sixty days and the public will not be prejudiced. The decision on whether to accept an incomplete application rests with the chair. The chair is not concerned about who has the burden of persuasion; it only matters whether the chair is convinced that the matter should go forward. The staff does not support the suggested change here.

MCEA objects to a statement in the SONAR at page 36 where the EQB stated that it is not in anybody's interest to reject an application. Again, it is not appropriate to change the SONAR. By reviewing a draft application, or two or three in some cases, the EQB is doing what the MCEA suggests is in the best interests of everybody – sending an application back for supplement before commencing the formal permitting process.

Part 4400.1350. NOTICE OF PROJECT

The Sierra Club, the Reinhardts, MCEA, and the Department of Commerce all commented on the notice requirements. Generally, the commenters like the changes the staff proposed for the notice language in our comments of October 11. The Transmission

Owners did not file any objection to the changes. The EQB staff believes that the changes suggested in the October 11 comments will ensure that information is conveyed to the public in a clear and timely fashion. We do not support additional changes to the language about notice of draft applications, as explained above for part 1250. We think language explaining how to get your name on the project contact list, as requested by MCEA, is unnecessary because the notice tells the reader to contact the public advisor at the EQB for help in understanding the process. This can be included in the notice without specifying it in the rule. Finally, the Department of Commerce suggested that it may be possible to coordinate notices required under chapter 4400 with notices required under new rules being developed by the PUC for transmission planning activities by utilities. The EQB staff will be involved in the PUC's rulemaking efforts and both agencies can be alert to possible ways to mesh notice requirements. The public and the utilities can also consider these possibilities.

The Department of Natural Resources also commented about the notice procedures. The DNR suggested that the rules require automatic distribution of several documents, including environmental assessments, scoping decisions, and responses to comments, to the EQB's general mailing list. EQB staff recognizes that it is important to distribute information and documents about pending projects to the appropriate people, but we prefer to try to do that with mailing lists generated specifically for large energy projects than to use the more general lists. The DNR's comment is a good one but we think we can ensure notification through proper creation of the mailing lists required under the proposed rules.

Part 4400.1550. PUBLIC MEETING

The present rule requires a public meeting to be held within sixty days after a permit application is accepted by the chair and to provide at least ten days notice of the meeting. The Sierra Club and MCEA want more notice of the meeting and more time to prepare. EQB staff appreciates the desire for more notice and more time but given the one year or six month deadline for completing the process, depending on whether the project qualifies for full review or the alternative review, there is not a great deal of time for everything to be completed. Things have to happen fast once a permit application is accepted. The EQB staff prefers to leave the rule as proposed, with the recognition that the agency is aware of the desire for more notice. The rule does not prohibit the EQB from giving more notice than the minimum time spelled out in the rule, and that will be done in appropriate circumstances.

Part 4400.1700. PREPARATION OF EIS

The Sierra Club and MCEA commented on various sections of this rule. MCEA complains about the language in subpart 4 that says the scoping process should be used to reduce the scope and bulk of the EIS. This language is taken from the general environmental review rules promulgated by the EQB. Minn. Rules part 4410.2100, subp. 1 ("The scoping process shall be used before the preparation of an EIS to reduce the scope and bulk of an EIS, identify only those potentially significant issues relevant to the

proposed project, define the form, level of detail, content, alternatives, time table for preparation, and preparers of the EIS, and to determine the permits for which information will be developed concurrently with the EIS.") This language has not caused problems or disagreements in other situations and should not be a problem here.

The Sierra Club wants to amend the language in subpart 5, which eliminates certain issues from consideration by the EQB when the Public Utilities Commission has determined the need for the facility. This is a requirement of statute. Minn. Stat. § 116C.53, subd. 2. The Sierra Club wants the rule to say that these issues are only off the table if the PUC has decided them. Under the statute, size, type, and timing issues, and issues of voltage and system configurations, are ones for the PUC to decide. When the matter is before the PUC for determination of need, these issues must be addressed by the PUC and will not be addressed by the EQB.

The Sierra Club would also like a reference in subpart 12 to the fact that environmental review at the certificate of need stage will be conducted under a different rule, Minn. Rules parts 4410.7000 to 4410.7700. The EQB staff has been working on amendments to chapter 4410 to address the matter of environmental review of large energy projects before the Public Utilities Commission. The EQB just published a notice in the State Register on October 14, 2002, soliciting public comments on possible amendments to 4410.7000 to 7500; the comment period closes on December 6, 2002. Draft rules have been made available for public review. Those draft rules do contain a provision that says the 4410 rules apply to environmental review during the PUC's consideration of need, while chapter 4400 provides for additional review at the EQB permitting stage. It makes sense to have similar language in these rules.

The EQB staff recommends that a new part 4400.0350 be added to read as follows:

Part 4400.0350. APPLICABILITY. Minnesota Rules chapter 4400 establishes the requirements for the processing of permit applications by the Environmental Quality Board for large electric power generating plants and high voltage transmission lines. Requirements for environmental review of such projects before the Public Utilities Commission are established in the applicable requirements of Minnesota Rules chapter 4410.

Adding a new part is preferable to the Sierra Club's suggestion to amend 4400.1700 because chapter 4410 applies broadly to review at the need stage before the PUC. Also, adding a separate part is the way it is proposed in the chapter 4410 amendments.

Part 4400.1800. CONTESTED CASE HEARING.

The Department of Commerce has raised a point similar to that raised by the Sierra Club regarding preclusion of certain issues from EQB consideration when the Public Utilities Commission has determined need for the project. As with the Sierra

Club's suggestion, we think it is preferable to be as consistent with the statutory language as possible. The proposed language more closely tracks the statute than does the Department's language, and we think the proposed language is preferable.

Part 4400.2500. PUBLIC MEETING.

MCEA raises the same comment about the timing of a public meeting under the alternative process as they did for the public meeting held on the larger projects under the full process. As we said before with regard to part 1550, we acknowledge the desire for more time and will take that into account in processing permit applications, but the staff is reluctant to build more time into the rules.

MCEA also points out that a reference to 1550 may not be appropriate because there is a reference to an EIS in 1550, subp. 1 and no EIS is prepared on the smaller projects under the alternative process. EQB staff does not think that there will be any confusion caused.

Part 4400.2000 QUALIFYING PROJECTS.

The Department of Commerce pointed out with regard to part 4400.5000 that the phrase "qualifying facilities" might cause some confusion with the use of that phrase in statutes relating to the Public Utilities Commission. The staff recommends that to address this concern, the title of this part and the title of subpart 1 should be changed to read "eligible projects."

Part 4400.2750 PREPARTION OF ENVIRONMENTAL ASSESSMENT.

The Sierra Club wants the same changes here as it suggested for part 4400.1700 regarding exclusion of certain issues from consideration by the EQB. For all the same reasons, the staff does not support this change.

The Department of Commerce suggests that language in subpart 2.B. be changed to clarify that the entire record will be relied on by the chair in determining the scope of the environmental assessment. Although the Department does not mention it, the same comment probably applies to part 4400.1700, subp. 3 since the language is the same in both in the staff's October 11 version. It seems unnecessary to adopt the change suggested because it is a matter of law that the record will have to support the chair's decision if there is a judicial challenge to the scope of environmental review. It is important to be clear that it is the chair who will make the scoping decision, which the proposed language does. The law will ensure that it is the record that is important.

The Transmission Owners would like to see the language in subpart 4 clarified that in the alternative process an applicant is not required to propose an alternative to the preferred site or route. The Owners would also like to make the language consistent with part 4400.1700 and to clarify that it is alternative sites or routes that will be evaluated, and not alternatives to a power plant or transmission line. The EQB staff agrees that

alternative sites or routes will not always be considered for projects that qualify for alternative review. We also agree that it is appropriate to clarify that it is alternative sites and routes that may be considered. We don't accept completely the Transmission Owners' language but we think the following changes would improve the rules and we recommend they be amended as follows:

Subp. 3. Scoping decision. . . . The scoping decision by the chair must identify:

A. the alternative~~s~~ sites or routes, if any, to be addressed in the environmental assessment;

Subp. 4. Content of environmental assessment. The environmental assessment must include:

A. a general description of the proposed facility;

B. a list of any alternative~~s~~ sites or routes ~~to the proposed project to be~~ that are addressed;

C. a discussion of the potential impacts of the proposed project and each alternative site or route on the human and natural environment;

D. a discussion of mitigative measures that could reasonably be implemented to eliminate or minimize any adverse impacts identified for the proposed project and each alternative site or route analyzed;

E. an analysis of the feasibility of each alternative site or route considered;

F. a list of permits required for the project; and

G. a discussion of other matters identified in the scoping process.

Part 4400.2850. PUBLIC HEARING.

The Department of Commerce recommended the same change here as it did for part 4400.1800, subp. 2. EQB staff prefers the proposed language for the same reasons previously discussed.

Part 4400.3050. STANDARDS AND CRITERIA.

The Sierra Club likes the recognition in this provision to the Minnesota Environmental Policy Act and the Minnesota Environmental Rights Act that the staff proposed in the October 11 comments but would like to amend the language slightly. We

don't object to the Sierra Club language; both versions provide the same thing. We recommend the following:

4400.3050 STANDARDS AND CRITERIA.

No site permit or route permit shall be issued in violation of the site selection standards and criteria established in Minnesota Statutes, sections 116C.57 and 116C.575, and in rules adopted by the board. The board shall issue a permit for a proposed facility when the board finds, in keeping with the requirements of the Minnesota Environmental Policy Act, Minnesota Statutes chapter 116D, and the Minnesota Environmental Rights Act, Minnesota Statutes chapter 116B, that the facility is consistent with state goals to conserve resources, minimize environmental impacts, and minimize human settlement and other land use conflicts and ensures the state's electric energy security through efficient, cost-effective power supply and electric transmission infrastructure.

Part 4400.3150. FACTORS CONSIDERED.

The Department of Natural Resources wants specific references to certain water impacts included in this part, as it did with part 4400.1150. We think the kind of impacts DNR is concerned about are included in the general language of the rule, and we prefer to keep the more generic language without attempting to list the various factors that EQB or other agencies would consider in deciding whether to issue a site or route permit. As with the earlier discussion, applicants are well advised to know that EQB and DNR will require the kind of specific data on water availability and water impacts that DNR has identified.

Part 4400.3250. FACTORS EXCLUDED.

This is another place where the Sierra Club wants language revised regarding whether the EQB will consider issues of size, type, and timing after the PUC has issued a certificate of need. Again, the proposed language is better.

Part 4400.3450. PROHIBITED SITES.

The Department of Natural Resources wants trout streams to be included in the list of areas where a power plant cannot be built rather than just an exclusionary area that must be avoided if an alternative exists. DNR says that because only temporary water appropriation permits can be issued (two years maximum), trout streams may be prohibited. The EQB staff has not considered this issue up to this point. If the temporary nature of the permit may preclude a developer from building a power plant in such an area anyway, it is probably acceptable to hold off making a decision on this matter until further consideration can be given to the question.

The DNR also suggests that subpart 2 could be read to imply that the EQB issues water appropriation and discharge permits. The language is essentially the same as the language that has been in the rules for years. Minn. Rules part 4400.3310, subp. 2. Certainly, nothing in this rule is going to change the fact that the DNR and the Pollution Control Agency issue permits for water appropriation and wastewater discharges. Rather than add a sentence recognizing that other agencies issue permits, we recommend that the language simply be clarified to indicate that it is an EQB site permit that can be conditioned.

> Subp. 2. **Water use.** The areas identified in subpart 1 must not be permitted as a site for a large electric power generating plant except for use for water intake or discharge facilities. If the board includes any of these areas within a site for use for water intake or discharge facilities, it may impose appropriate conditions in the site permit to protect these areas for the purposes for which they were designated. The board shall also consider the adverse effects of proposed sites on these areas which are located wholly outside of the boundaries of these areas.

The DNR also suggests additions to subpart 5 to emphasize the need to obtain a water appropriation permit and clarifying that material adverse effects on groundwater must be avoided. Again, this language comes from the existing language, Minn. Rules part 4400.3310, subp. 5, and there have been no problems with the language in the past. The first change, to state that a DNR permit is required, is unnecessary because the Power Plant Siting Act already provides that state agencies must participate in the EQB permitting process and state whether a proposed project is permittable on the site proposed. Minn. Stat. § 116C.61, subp. 3. The additional language DNR suggests seems unnecessary, but since the rule already talks about groundwater impacts, it seems appropriate to add the additional language requested by DNR. Therefore, we recommend that the second sentence in this subpart be amended to read: "No use of groundwater may be permitted where removal of groundwater results in material adverse effects on groundwater, groundwater dependent natural resources, or higher priority users in and adjacent to the area, as determined in each case."

Part 4400.4050. EMERGENCY PERMIT.

Both the Sierra Club and MCEA want language added to this rule that precludes a utility from relying on an emergency situation if the emergency was attributable in any way to the utility. The statute makes no reference to the cause of the emergency. Minn. Stat. § 116C.577. It matters not to the customers whose electrical service is threatened what the cause of the emergency is. A utility that causes an emergency situation to arise may have other problems to address, but the EQB is not going to refuse to consider an emergency because of the cause. Also, as we stated in the SONAR at page 70, only one emergency situation has arisen in nearly 30 years. Given the planning activities that are ongoing, emergencies should continue to be rare. Also, it is interesting that the

emergency statute gives the EQB seven months to respond, while under the alternative permitting process, the agency has only six months.

Part 4400.5000. LOCAL REVIEW.

The Transmission Owners and the Association of Minnesota Counties raise a concern over who will decide whether a local unit of government has regulatory control over a proposed project that is eligible for local review. The proposed language is not intended to interfere with the exercise of local jurisdiction but only to emphasize that some governmental body has to have permitting authority over a proposed project. If the local unit of government does not have any regulatory requirements over power plants or transmission lines, the EQB believes that the local option is not available. The other interpretation would mean that certain projects are exempt from review because a particular county has chosen not to regulate such facilities.

The question, of course, is who is going to decide whether the local unit of government has regulatory requirements in place or not. The Transmission Owners and the Association of Minnesota Counties want the rule to be clarified that it is the local officials obligation to make that determination. The EQB staff agrees. If the local unit of government says it has regulatory control over a project, the EQB should accept that. Persons who disagree can challenge the local decision. The staff recommends that the language in the rule be amended to read as follows:

> **4400.5000. LOCAL REVIEW.**
>
> Subp. 6. **No local authority.** In the event a local unit of government that might otherwise have jurisdiction over a proposed large electric power generating plant or high voltage transmission line <u>determines that it</u> has no ordinances or other provisions for reviewing and authorizing the construction of such project or has no capability of preparing an environmental assessment on the project, the <u>local unit of government shall refer the</u> matter ~~must be brought~~ to the EQB for review.

The Reinhardts have commented that subpart 3 regarding notice should be expanded to require applicants who apply to local units of government to give the same kind of notice that applicants must give when they apply to the EQB. The Reinhardts especially want to ensure that landowners who own property that is on or adjacent to a proposed power plant site or transmission line route are notified that a permit has been applied for. The Reinhardts want the EQB to require in the rules that an applicant must give essentially the same notice for local projects that the EQB requires when a state permit is applied for. The proposed rules do not require the same notice because the agency has felt that if a project is to be reviewed locally, the local officials should decide how notice to the public should be accomplished. The statute authorizing local review of certain projects, Minn. Stat. § 116C.576, does not specify how notice is to be given.

Section 116C.576, subp. 3, simply requires notice to the EQB that a permit has been applied for locally.

The EQB staff believes that the agency should minimize the requirements the state rules impose on local officials when they review eligible projects. It is appropriate to require applicants to notify the state that they have elected to proceed locally and to notify those persons who have gone to the effort of placing their names on the EQB list that will be used to advise people of all proposed large energy facilities, and it is appropriate to insist that environmental review occur, but the EQB recognizes that if projects are going to proceed locally, the locals must determine how best to do that and keep their citizens informed. The local unit of government would be well advised to ensure that the public is aware of a proposed project, but the manner in which they do that is up to them. The EQB staff does not recommend the changes suggested by the Reinhardts.

The Department of Commerce pointed out that the EQB's use of the word "facilities" in the title for subpart 2 might cause confusion with the use of the phrase "qualifying facilities" in Minn. Stat. § 216B.14. It is certainly easy enough to change. The staff recommends that the title of subpart 2 be changed to "Eligible Projects.

CONCLUSION

The EQB staff believes that it has responded to every single comment that was submitted to the judge. The above discussion indicates the changes that the staff supports, and the reasons for the support. The attached version of the rules shows by strikeout and underline the rules as the staff would like to see them adopted.

Dated: ____October 22, 2002____ _____

Alan Mitchell
Manager, Power Plant Siting

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